No. 87-1104

In The

Supreme Court of the United States

October Term, 1987

RALPH M. KEMP, WARDEN,

Petitioner,

v.

WILLIAM NEAL MOORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1.

Under what circumstances does a federal habeas corpus petitioner's assertion of a "change in the law" justify the failure to raise claims in an initial application for federal habeas corpus relief, so as to constitute an exception to the abuse of the writ of doctrine?

2.

Whether the "ends of justice" authorize the consideration of Respondent's belated *Gardner* claim when said claim is conclusively without merit and there have been repeated opportunities to litigate the claim prior to Respondent's second application for federal habeas corpus relief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–Continued

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CITATION TO OPINIONS BELOW

The Petitioner, Ralph Kemp, Warden, has asked that this Court review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 4, 1984, and July 27, 1987.

The initial opinion of the United States District Court for the Southern District of Georgia denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief, finding certain allegations to constitute an abuse of the writ and certain allegations to be waived, was entered on May 22,

1984. On June 4, 1984, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion in *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Petitioner's Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit granted rehearing *en banc*. (Petitioner's Appendix B). On June 27, 1987, the *en banc* court of the Eleventh Circuit reversed the district court's finding of an abuse of the writ in part and remanded the case in part. (Petitioner's Appendix C). *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1987) (*en banc*). Petitioner's petition for rehearing was denied by the Eleventh Circuit on October 7, 1987. (Petitioner's Appendix D).

JURISDICTIONAL STATEMENT

Petitioner has asked this Court to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 27, 1987. Petitioner's petition for rehearing was denied by the Eleventh Circuit Court of Appeals on October 7, 1987. The Eleventh Circuit granted Petitioner's motion for stay of the mandate until December 15, 1987. The petition for writ of certiorari was filed within the allowable ninety days and was granted by this Court on April 18, 1988. This Court's jurisdiction has been invoked pursuant to 28 U.S.C. § 2254(1).

STATUTORY PROVISIONS

Rule 9(b) of 28 U.S.C. § 2254:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on the merits, or if new or different grounds are alleged, the judge finds that the failure of petitioner to assert those grounds in a prior petition constitutes an abuse of the writ.

STATEMENT OF THE CASE

Respondent, William Neal Moore, was indicted by the grand jury in the Superior Court of Jefferson County, Georgia for the offenses of malice murder and the armed robbery of Fredger Stapleton. Respondent waived a trial by jury with respect to both charges on June 4, 1974, and thereupon entered a plea of guilty to these charges. (J.A. 4-17). Respondent's sentencing hearing was set for July 17, 1974. Prior to the sentencing hearing, probation officer J. Clark Rachels prepared a pre-sentence report utilizing information from numerous sources, including Respondent himself. According to Mr. Rachels, individual copies of this report were provided to the trial court, defense counsel and the prosecutor prior to the sentencing hearing. (J.A. 105-107). On July 17, 1974, the trial court, acting as sentencer, imposed the death penalty upon Respondent following the receipt of certain testimony and evidence for the court's consideration. (J.A. 18-80). The trial court found that the death penalty was authorized by the statutory aggravating circumstance contained in

O.C.G.A. § 17-10-30(b)(2), i.e., that the murder was committed during the course of another capital felony to wit, armed robbery.

Respondent's convictions and sentences were affirmed on direct appeal to the Supreme Court of Georgia in *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). In its opinion, the Supreme Court of Georgia conducted its sentence review, which is mandatory under Georgia law in all cases in which the death penalty has been imposed, in accordance with O.C.G.A. § 17-10-35. This Court denied Respondent's petition for a writ of certiorari on July 6, 1976, in *Moore v. Georgia*, 429 U.S. 873 (1976).

A petition for a declaratory judgment filed by Respondent was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). A petition for a writ of certiorari to review the affirmance of the denial of the declaratory judgment was denied by the Court in *Moore v. Georgia*, 434 U.S. 878 (1977).

Respondent, represented by counsel, filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978. On July 13, 1978, the state habeas corpus court denied Respondent the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal.

On November 22, 1978, Respondent filed an application for federal habeas corpus relief pursuant to 28

U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. (J.A. 111-120). Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Respondent's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of the case. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and Respondent cross-appealed.

Following oral argument, a panel of the Eleventh Circuit Court of Appeals reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a nonstatutory aggravating circumstance. Petitioner filed a suggestion for rehearing *en banc* based on the latter portion of the panel opinion. The petition for rehearing *en banc* was granted, with the prior panel opinion dated June 23, 1983, being withdrawn and a new opinion, dated September 3, 1983, being substituted in its place. In its decision of September 30, 1983, the Eleventh Circuit reversed that portion of the prior opinion granting federal habeas corpus relief.

Respondent Moore then filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the Eleventh Circuit on December 13, 1983. Next, Respondent filed a petition for a writ of certiorari which was denied by this Court on March 5, 1984.

On March 12, 1984, the district court made the judgment of the circuit court its judgment in the case of

Moore v. Balkcom and Bolton, Civil Action No. 478-309. A new execution date was then scheduled for May 24, 1984. Respondent filed a successive petition for state habeas corpus relief in the Superior Court of Butts County, Georgia. On May 17, 1984, a hearing was held in the Superior Court of Butts County, Georgia on Respondent's motion for a stay of execution and on Petitioner's motion to dismiss the petition for writ of habeas corpus as successive under O.C.G.A. § 9-14-51. On May 18, 1984, the Superior Court of Butts County, Georgia entered an order dismissing the petition as successive within the meaning of O.C.G.A. § 9-14-51. Respondent sought an application for a certificate of probable cause to appeal from the order of the Superior Court of Butts County, but this application was denied on May 18, 1984.

Also on May 18, 1984, Respondent filed a successive application for federal habeas corpus relief in the district court, raising some of the issues contained in the successive petition for a writ of habeas corpus filed in Butts County and also raising other issues previously raised in prior state court proceedings. (J.A. 154-187).

On May 21, 1984, a hearing was held in the United States District Court for the Southern District of Georgia in order to allow Respondent an opportunity to present evidence and oral argument as to each of the claims raised by Respondent on their merits, as well as to respond to the Petitioner's allegation that the second federal petition constituted an abuse of the writ within the meaning of Rule 9(b) of the Rules Governing Section 2254 Proceedings.

On May 22, 1984, the district court entered an order denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived, but granting Respondent's application for a certificate of probable cause to appeal. (Petitioner's Appendix A). Respondent filed a notice of appeal to the Eleventh Circuit on May 22, 1984.

Oral argument was conducted before a panel of the Eleventh Circuit on May 24, 1984, following the granting of the stay of execution on May 23, 1984, by that court. On June 4, 1984, the panel of the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Petitioner's Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit also granted rehearing *en banc*. (Appendix B). On July 27, 1987, the *en banc* court reversed in part the district court's finding that there was an abuse of the writ and remanded the case in part. *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1984). (Petitioner's Appendix C). Petitioner's suggestion for rehearing *en banc* was denied by the Eleventh Circuit on October 7, 1987. (Petitioner's Appendix D).

Petitioner sought review by this Court of the *en banc* decision of the Eleventh Circuit dated July 27, 1987, which decision declined to conclude that the entire second application for federal habeas corpus

relief constituted an abuse of the writ within the meaning of Rule 9(b). (Petitioner's Appendix C). This Court granted the writ of certiorari on April 18, 1988.

ARGUMENT AND CITATION OF AUTHORITY

I. RESPONDENT'S "NEW LAW" CLAIMS COULD REASONABLY HAVE BEEN RAISED IN HIS FIRST APPLICATION, AS THERE WAS A LEGAL FOUNDATION FOR MAKING SUCH CLAIMS, AND THEREFORE, THEIR PRESENTATION FOR THE FIRST TIME IN THE SECOND APPLICATION CONSTITUTES AN ABUSE OF THE WRIT.

To delay the the ultimate resolution of a capital case and to avoid a final determinative outcome of all issues presented in such case is the aim of all capital litigants. The Respondent in this case has successfully prolonged post conviction proceedings in connection with the guilty plea he entered in June of 1974 for almost 13 years and 4 months. Respondent's guilty plea and his resulting death sentence imposed by the trial judge on July 17, 1974, have been reviewed by various state and federal courts on some 18 occasions and by 98 state and federal judges.

Respondent's first "round" of post conviction proceedings, in both state and federal courts, took 9 years and 9 months to complete. (June of 1974 to March 12, of 1984). Respondent's second "round" of post convictions review took 3 years and 5 months, ending with the decision of the Eleventh Circuit in this case, which

decision is now the subject of review by this Court. Obviously, the Eleventh Circuit's decision did not finally resolve the viability of all the claims presented by the Petitioner, but rather remanded the case for further proceedings in the district court. Thus, if left intact by this Court, this case would still not be final in any respect.

As this Court is well aware, it is now almost commonplace for federal habeas corpus petitioners, such as Respondent, to pursue at least a second round of post conviction review, in addition to the extensive review available to a federal habeas corpus petitioner in the first instance. As noted above, the second series of post conviction proceedings can be extremely lengthy, even where successive federal habeas corpus applications are subject to a legitimate pleading that there has been an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254. As the Fourth Circuit stated in *Miller v. Bordenkiercher*, 764 F.2d 245, 249 (4th Cir. 1985), in dealing with a petitioner who had attacked his guilty plea utilizing collateral proceedings for the third time, "To speak thus firmly on the matter is not to speak harshly. At some point, the system must declare that justice has been done insofar as human capacity exists to dispense it."

Therefore, it is not in an attempt to curb the utilization of the writ of habeas corpus that prompts Petitioner to note that the abuse of the writ doctrine must be more fully developed and more faithfully applied. Rather, further clarification of this doctrine is needed to guide the federal district courts in their consideration of the greatly increasing numbers of successive

applications by capital litigants, with specific guidance being needed as to any "exceptions" which are available under Rule 9(b) and the limitations on these exceptions.

The most utilized assertion by capital litigants filing successive applications for federal habeas corpus relief, in light of the prohibition against piecemeal litigation as contained in *Murch v. Mottram*, 409 U.S. 41, 45 (1976) and *Wong Doo v. United States*, 265 U.S. 239, 241 (1924), is that a claim was not previously raised in the initial application because the claim allegedly rests on a "change in the law," which has occurred subsequent to the filing of the initial application. However, by merely incanting the allegedly magic words of "change in the law," federal habeas corpus petitioners attempt to place new labels on essentially old claims and attempt to excuse the petitioner from the omission of these claims from the initial proceeding, thereby preventing the finality of judgment that would support the imposition of the death penalty. Respondent's case is part of a pattern observed by this Court in *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 753 (1984):

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward - often in a piecemeal fashion - only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate - even in capital cases, this type of abuse of the writ of habeas corpus.

Despite the admonition by this Court in *Woodard v. Hutchins, supra*, the district courts continue to tolerate

piecemeal litigation, and more disturbingly are increasingly tolerating an entire second or even third round of post conviction proceedings that essentially revolve around the same basic issues. Without guidance from this Court as to the standards federal district courts should utilize in reviewing clearly abusive petitions, especially where claims raised therein are allegedly based on changes in the law, endless rounds of federal habeas corpus actions are guaranteed. This is especially true in cases such as this, where more than five years elapsed between the filing of Respondent's first federal habeas corpus petition in November of 1978, and the filing of his second federal habeas corpus petition in May of 1984. It is apparent that there will be new decisions rendered by this Court and other courts during such a lengthy time period. These recent decisions then serve as the basis upon which a federal habeas corpus petitioner asserts he should be allowed to raise an abusive claim for the first time.

As noted by this Court while examining the procedural history of the case presented in *Antone v. Dugger*, 465 U.S. 200, 104 S.Ct. 962, 965 (1984), "the federal and state courts carefully and repetitively have reviewed applicant's challenges to his conviction and sentence." The same is true in this case. Nevertheless, there still is no final disposition of Respondent's guilty plea and resulting death sentence and six of the allegations now belatedly raised by Respondent were allegedly not raised in the first federal petition because they are now asserted to be based on "new law." *Moore v. Kemp*, 824 F.2d 847, 860 (11th Cir. 1987) (*en banc*).

The appropriate treatment to be given claims based on "new law" is only briefly mentioned in Rule 9(b) itself. Rule 9(b) notes the district courts' obligation to determine whether a petitioner's delay in presenting a new claim in a subsequent petition, rather than an initial application, constitutes an abuse of the writ so as to warrant the district court to decline to review these "change in the law" issues on their merits.

The disposition to be made of claims based on changes in the law is only fleetingly discussed in the Advisory Committee Notes to Rule 9(b). These Notes discuss the requirement of Rule 9(b) "that the judge finds a petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable." The Notes also provide a noninclusive list of circumstances in which the failure to raise claims in a prior petition may be excusable, i.e., a retroactive change in the law and newly discovered evidence. However, neither the Rule nor the Advisory Committee Notes deal with the ever-increasing scenario of successive petitions raising claims which allegedly could not have been presented in the prior application because they are based on "new law" which may or may not be retroactive. It is in reviewing claims based on developments in the law which are nonretroactive that the federal district courts clearly need guidance as to how such claims should be reviewed. Additionally, federal habeas corpus petitioners need to be discouraged from abusing the writ by omitting such claims from initial applications and then cavalierly asserting them for the first time after years of post conviction litigation and simply

requesting that they be reviewed for the first time based on recent legal developments.

As Justice Harlan stated in his separate concurring opinion in *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148 (1971); separate opinion at 401 U.S. 675, 91 S.Ct. 1171, 1179 (1971):

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

As Justice Harlan also observed, "if law, criminal or otherwise, is worth having and enforcing, it must at some point provide a definitive answer to the questions litigants present or else it never provides an answer at all." *Id.* It is respectfully submitted that no answer has been provided to the Respondent in this case nor to the State of Georgia seeking to enforce its legally imposed conviction and resulting death sentence.

The federal district courts find themselves in a quandary in distinguishing between those situations in which legitimate claims are presented based on substantial departures in the law from those claims which are simply new attempts to litigate old issues. The difficulties faced by the federal courts in this respect were also addressed by Justice Harlan in his concurrence in *Williams v. United States*, 91 S.Ct. at 1181:

> Secondly, in *Desist*, I went to some lengths to point out the inevitable difficulties that will arise in attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established

constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." 394 U.S. at 263, 89 S.Ct., at 1041. *See generally [Desist v. United States]* at 263-269, 89 S.Ct. 1041-1044. I remain fully cognizable of these problems and realize they will produce some difficulties in administering the writ, but believe they would be greatly ameliorated by adequate recognition of the principle of finality in the operation of the criminal process.

In attempting to develop a workable "test" for reviewing courts to utilize when examining an assertion of a change in the law that would authorize a federal district court to consider claims raised for the first time in a subsequent application for federal habeas corpus relief, Petitioner respectfully submits that it should be reiterated that once an abuse of the writ has been pled, "the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." *Price v. Johnston*, 334 U.S. 266, 292 (1984). In actuality, what commonly occurs is that the government in a federal habeas corpus action pleads an abuse of the writ in connection with a second application, the habeas corpus petitioner then mouths the magic words "change in the law," citing a recent case in support of the legal claim asserted, and then it becomes the government's "burden" to establish that there has been no change in the law which would authorize the review of a claim raised for the first time in a second or third application.

This requires the government to attempt to establish the state of mind, legal ability and knowledge of the law at a particular point in time of the prior habeas

corpus counsel of the petitioner, so as to establish whether there was in fact a change in the law, whether the law has already been changed but counsel was unaware of the change, or whether there did in fact exist to the knowledge of that habeas corpus counsel a legal foundation for asserting the claim at the time that the initial application was filed. Thus, at the present time, federal district courts are struggling with a makeshift "subjective" test for determining whether there has been a change in the law which would excuse a failure to present claims in an earlier petition.

The majority of the *en banc* court of the Eleventh Circuit held that "the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." *Moore v. Kemp, supra*, at 851. Obviously, this forces reviewing courts to attempt to determine subjectively the actual knowledge of the federal habeas corpus petitioner's attorney at the time the initial petition was filed. In attempting to apply this subjective test, the Eleventh Circuit grafted the "foreseeability" inquiry of procedural default cases into an analysis under the abuse of the writ doctrine. However, Petitioner asserts that the adoption of the "foreseeability standard" in the context of an abuse of the writ case is dangerous in that it affords a way in which a petitioner can easily dismiss a properly pled assertion of abuse of the writ by merely stating that the legal principle now being asserted is a "new claim" which was not foreseeable by counsel. *Moore v. Kemp, supra* at 862-863 n. 16, Tjoflat, J., dissenting.

The method advocated by Petitioner for reviewing legal principles raised for the first time in a second or subsequent application based on an alleged change in the law would require that a federal habeas corpus petitioner continue to carry the burden of proof placed on him by Rule 9(b) to excuse his conduct, rather than the burden in effect being on the state to prove that the conduct of the Petitioner was not excusable. Petitioner also advocates that any standard adopted by this Court should take into account that when, as in this case, there has been almost five years between the filing of an initial petition for federal habeas corpus relief and the second petition, there are bound to be natural developments in the law which a petitioner will attempt to exploit as an alleged change in the law to "excuse" his abusive conduct. However, something other than mere citation to "constitutional updating" or cases which are a natural progression stemming from older landmark or seminal cases must be required prior to excusing a petitioner's failure to raise a claim earlier.

As this Court observed in the context of discussing retroactivity in *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708, 713 (1987), "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes a vehicle for announcement of a new rule." Therefore, without some guidance and limitation on the "new law" exception to the abuse of the writ doctrine, every time a new case is decided, a "new rule" is announced which petitioners will continue to assert could serve as the basis for finding that a claim is newly available based on a change in the law.

Under Georgia law, in reviewing a second petition for state habeas corpus relief, the statutory language setting forth the determination to be made by the state habeas corpus court in reviewing a new claim asks whether the issue in question could reasonably have been raised in the earlier proceeding. *See* O.C.G.A. § 9-14-51. Petitioner respectfully submits that a similar standard should be adopted by this Court. Such a standard is sufficiently flexible to accommodate a case by case review, but still provide all parties, including the courts and litigants on both sides, a clear standard of review.

Petitioner asserts that it is only when there has been a substantial departure in legal precedent that a claimed "change in the law" would excuse the failure to raise a claim in the earlier application. If there is such a substantial departure, then by necessity, such a case would have been unforeseeable and a habeas corpus petitioner would have lacked the legal foundation upon which to assert such a claim at an earlier time. Petitioner submits that the key point of focus in a standard for review of belated claims based on an alleged substantial departure in the law would be a determination by the district court of the availability of a foundation for the belated new claim at the time the first federal habeas corpus petition was filed.

Assuming that there are no newly developed facts, the objective inquiry would be whether, at the time the first federal petition was filed, there existed an available legal foundation for raising the claim, even though there might be at the time of the second application additional cases to cite in support of the same legal

proposition. Petitioner also submits that it should not be a sufficient excuse for an abusive applicant for the writ to assert that there existed, at the time that the first application was filed, binding precedent contrary to a legal proposition asserted in the subsequent application. To continue to allow or to sanction in a new standard such a state of affairs insures that there will never be finality of any judgment no matter how conscientious the courts are in reviewing the applicable facts and law at the time that the claim is asserted.

In conclusion, Respondent submits that when the government properly pleads abuse of the writ, the threshold burden upon the applicant is to prove by clear and convincing evidence that the belated claim could not reasonably have been raised at the time of the first federal petition. Such a showing must require that the applicant demonstrate by clear and convincing evidence that the belated claim is based upon a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law, and finally, that the asserted new legal foundation is in fact a substantial departure from prior legal precedent.

Turning to the specific "new law" claims raised by Respondent in his second application:

(i)

Respondent alleges that his constitutional rights were violated because he was not advised of his right to

remain silent or his right to counsel prior to the presentence review conducted by Mr. J. Clark Rachels, a probation and parole supervisor. Respondent has contended that this claim rests on the decision of this Court in *Estelle v. Smith*, 451 U.S. 454 (1981). Basically, this is an attack on the circumstances surrounding the compiling of the pre-sentence report, which report was based, in part, on Respondent's interview with Mr. Rachels. The contents of the pre-sentence report and the circumstances surrounding the compilation of this report have been litigated throughout Respondent's post-conviction proceedings.

Respondent raised issues surrounding the pre-sentence report by amendment to his application for federal habeas corpus relief filed in the United States District Court for the Southern District of Georgia in October of 1980. However, the district court disallowed this untimely amendment finding that:[1]

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[1] In paragraph 5(a) of the original petition for writ of habeas corpus filed in the Superior Court of Tattnall County, Respondent alleged that his prior arrest record contained in the pre-sentence report was presented to the trial judge without the Respondent or his counsel being afforded a fair opportunity to explain or rebut it. The order of the Superior Court of Tattnall County, Georgia, in considering Respondent's first petition for writ of habeas corpus filed in 1978, clearly reflects that the officer who prepared the pre-sentence report filed an affidavit in the first state habeas corpus case stating that prior to sentencing, Mr. Rachels furnished a copy of the report to Respondent's attorney and Respondent's attorney requested a recess to review the contents of this report. (J.A. 105-107).

Nonetheless, the Court can see no sound reason for permitting further amendment at this late stage of the present case. As respondent points out, petitioner here has been represented by counsel at all times. Furthermore, counsel made explicit reference to the pre-sentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from Mr. Pierce and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence in the trial transcript, which appears to show that the report was turned over to Mr. Pierce, the transcript of July 17, 1978, at 28-28, the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination. Thus, the Court can find no basis for concluding that any sound reason exists to allow new counsel to resurrect this question. Motion to amend with respect to this argument is therefore denied.

Blake v. Zant, 513 F.Supp. 772, 805 (S.D.Ga. 1981).

Even though the report has been the subject of litigation, this is allegedly a different claim because it rests on "new law," the same being this Court's opinion in *Estelle v. Smith*, 451 U.S. 454 (1981). Petitioner has consistently urged that the decision in *Estelle v. Smith*, *supra*, is not a substantial departure in the law and does not establish new constitutional principles and a legal foundation which were unavailable to Respondent, who was represented by counsel, at the time of his first state and federal habeas corpus proceedings. Although this Court's decision in *Estelle v. Smith*, *supra*, was rendered on May 18, 1981, while the district court denied Respondent's first application on April 29, 1981, this Court in *Estelle v. Smith, supra*, relied on the much earlier decision of the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Estelle v. Smith, supra*, also relied on the prior decision of the Court in *In Re Gault*, 387 U.S. 1 (1967), in which the Court held that the "availability of the [Fifth Amendment] privilege does not turn upon the type of proceedings in which its protections are invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 39 as cited in *Estelle v. Smith*, at 462.

Petitioner has repeatedly asserted that this Court did not create a new constitutional right in *Estelle v. Smith, supra* as alleged by Respondent, but rather relied on its prior decision in determining the facts as presented to this Court in *Estelle v. Smith, supra*. No new constitutional principles were announced and there was no substantial departure from existing law such as to provide Respondent, at the time of the subsequent petition, with a legal foundation which did not exist at the time of the first petition. Respondent could have raised these allegations in his first application utilizing in *In Re Gault, supra*, or *Miranda v. Arizona, supra*.

The Eleventh Circuit concentrated on the foreseeability of *Estelle* when it held as follows:

> We hold that in November 1978, two and a half years before *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.E.2d 359 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to see the Fifth

> and Sixth Amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial. As a result, Moore's failure to raise the *Miranda* claim in his first habeas corpus petition was not an abuse of the writ.

Moore v. Kemp, supra at 851.

The proper inquiry is not one of foreseeability, but rather whether the claim could reasonably have been raised in 1978 at the time of the first application. Petitioner submits that the burden rested upon the Respondent in the district court to prove by clear and convincing evidence that this belated claim is based upon a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law and that the asserted new legal foundation is in fact a departure from prior legal precedent.

In the separate opinion of Judge Tjoflat in which Judge Vance joined, it was properly concluded that:

> A review of the state of the law in 1978 demonstrates that the Fifth and Sixth Amendment claims I have described, i.e., Moore's *Estelle v. Smith* and *Proffitt* claims, were available to a reasonably competent attorney. In the next two parts of this opinion I discuss the specific procedural antecedents of *Estelle v. Smith* and *Proffitt*. Contrary to the majority's conclusion, I believe that these antecedents provided Moore with the tools to present his Fifth and Sixth Amendment claims in his first federal habeas corpus petition.

Moore v. Kemp, supra at 869.

Petitioner respectfully submits that Judge Tjoflat properly utilized an objective standard in determining if there existed a legal foundation for the claim at the time of Respondent's first application, instead of focusing on the subjective state of mind of Respondent's habeas corpus attorney and thereby unduly focusing on the element of foreseeability.

Petitioner respectfully submits that with respect to this claim, this Court should reverse the *en banc* opinion of the Eleventh Circuit and find, as did Judge Tjoflat, that:

> The state of the law in 1978, when Moore filed his first federal habeas petition, demonstrates that he cannot be excused for having failed to recognize and allege his *Estelle v. Smith* claim. *Estelle v. Smith* was merely the refinement of constitutional principles that the Supreme Court had already established; Moore therefore had ample thread from which to weave the Fifth and Sixth Amendment claims recognized in that case when he first sought federal habeas relief.

Moore v. Kemp, supra at 870-871.

Because Respondent failed to carry his burden of proof on all three factors entailed in a proper abuse of the writ analysis, the circuit court's decision requires reversal.

(ii)

The next claim raised by Respondent under the pretext of "new law" is Respondent's claim made pursuant to *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.

1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983). In similar fashion to the *Estelle* claim, the Eleventh Circuit found:

> As we concluded with respect to the *Estelle v. Smith* claim, the failure of Moore and his counsel in 1978 to anticipate this extension does not render the omission of the claim from the first petition an abuse of the writ. Accordingly, we reversed the district court's dismissal of the *Proffitt* claim on abuse grounds and remand for the reconsideration of the merits of the claim.

Moore v. Kemp, supra at 854.

Again, Judge Tjoflat properly analyzed the issue of whether the *Proffitt* claim was abusive, as follows:

> In his second federal habeas petition, Moore also presented, for the first time in federal court, a claim that the admission into evidence of the presentence report violated his Sixth Amendment right to confront and cross-examine the witnesses whose statements the report memorialized. Specifically, he alleged that an opportunity to confront and cross-examine those witnesses 'could have corrected the misimpressions about his financial, military and marital circumstances, clarified the circumstances of the crime, and presented the truth about his prior juvenile record.' The majority today holds that Moore's failure to raise this claim in his earlier petition was excused because confrontation rights were not explicitly extended to capital-sentencing proceedings until this Court's decision in *Proffitt v. Wainwright*, (*cites omitted*). Because I believe that *Proffitt*, like *Estelle v. Smith*, did not articulate a new constitutional rule, I would affirm the district court's judgment that Moore's omission of this claim in his earlier petition was not excusable.

Moore v. Kemp, supra at 872-873.

Judge Tjoflat went further and noted that, "Although the law in this field was in a state of disarray, the clear trend was toward expanding the full panoply of Sixth Amendment rights including the confrontation rights." *Moore v. Kemp, supra* at 873. Judge Tjoflat then concluded:

> By themselves, these cases probably foreshadowed our court's holding in *Proffitt* and provided a reasonable basis for the confrontation clause claim Moore seeks to present at this time period. Indeed, this type of claim was recognized by many commentators and attorneys well before Moore filed his first habeas corpus petition in late 1978.

Id. at 874.

Then Judge Tjoflat properly found two additional factors to "compel the conclusion that a *Proffitt* claim was available in 1978." Judge Tjoflat stated:

> Moore's habeas attorney should also have been prompted to raise a *Proffitt* claim (1) because Moore was convicted of a capital crime and (2) because the Supreme Court handed down *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.E.2d 393 (1977), more than one year before Moore brought his habeas petition in federal court.
>
> In light of the special nature of capital punishment, a reasonable attorney would have been more likely to press a confrontation clause argument with regard to capital sentencing than with regard to non-capital sentencing.

It is clear that Respondent's counsel had ample "legal ammunition" in 1978 to raise this claim. As noted earlier, because Respondent has completely failed to

carry his burden of proof on all three components of a proper abuse of the writ analysis, this circuit court's decision requires reversal.

II. THE "ENDS OF JUSTICE" DO NOT REQUIRE CONSIDERATION OF RESPONDENT'S BELATED CLAIM MADE PURSUANT TO *GARDNER V. FLORIDA*, 430 U.S. 349 (1977).

(i)

Respondent's first petition for the writ of habeas corpus filed in the Superior Court of Tattnall County, Georgia contained the allegation, under paragraph 5(a), "His prior arrest record, contained in a pre-sentence report, was presented to the trial judge without the Petitioner or his counsel being afforded a fair opportunity to explain or rebut it." The state habeas corpus court, in denying Respondent's petition specifically found, citing pages 27 and 28 of the trial transcript, that Respondent's allegation that his constitutional rights were violated because the state allegedly failed to furnish Respondent or his attorney a copy of the pre-sentence report was without factual merit. (J.A. 48-49). *See also Blake v. Zant*, *supra* at 805. Thus, it is clear that this allegation had been exhausted in the state courts before Respondent filed his first federal application. This issue whose basis is *Gardner v. Florida*, 430 U.S. 349 (1977) was clearly ripe for presentation and review by the federal district court at the time Respondent filed his first federal

application. This Court's decision in *Gardner v. Florida, supra*, was rendered prior to the filing of the first federal application on November 22, 1978.

When Respondent filed his first federal petition on November 22, 1978, he did not include a *Gardner* claim. Because the *Gardner* claim was noted, however, in the procedural history portion of the petition and because Respondent was then being represented by the same attorney who litigated Respondent's state habeas corpus petition, this omission, as noted by Tjoflat, Judge, dissenting at 875, "appears to have been deliberate." Respondent did not seek to add the *Gardner* claim until October 1, 1980, via a disallowed amendment.

Respondent reasserted the *Gardner* claim in his second petition. In reviewing the abusive nature of the second federal application the Eleventh Circuit properly found, "*Gardner* was decided in 1977; therefore this is not a claim based on alleged 'new law' declared since the first federal petition." *Moore v. Kemp*, *supra* at 855. Nevertheless, the Eleventh Circuit vacated the order of the district court finding Respondent's *Gardner* claim to be abusive and remanded the case "in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim." *Moore v. Kemp*, *supra* at 857.

In the district court's order dismissing the *Gardner* issue as an abuse of the writ, that court correctly concluded that Respondent's claim was factually without merit.

> [C]ounsel made explicit reference to the presentencing report issue in the original habeas petition,

> thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from [Moore's trial counsel] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that the report was turned over to [Moore's trial counsel], the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination.

Moore v. Kemp, 824 F.2d at 876.

As Judge Tjoflat correctly opined on the basis of the application, files and records of this case as such appeared in the district court, the circuit court and now before this Court, this claim should be treated as being conclusively without merit. *Id.* at 876-877, citing *Sanders v. United States*, 373 U.S. 1, 15 (1963). For this reason, the circuit court's decision remanding this claim should be reversed.

Petitioner submits that a remand in light of *Smith v. Murray*, 477 U.S. 527 (1986), is unwarranted because the concerns for the "fundamental principles of justice" implicated in the context of a procedurally defaulted claim are not congruent with and do not mirror those concerns of a federal reviewing court attempting to determine whether the ends of justice require relitigation of a claim previously raised. In a procedural default case, the inquiry is whether with respect to the scope of the federal court's initial review, the applicant should be afforded any review on the merits of an untimely raised claim. However, an ends of justice

analysis becomes operative only *after* the applicant has already been afforded his opportunity for federal review of this claim on the merits and he seeks to have the identical claim revisited on the merits in a subsequent application.

The fundamental policy concern which underlies the concept of procedural default is the desire for comity between sovereigns. However, the fundamental policy concern which underlies the concept of ends of justice is deference by a federal court to the concept of law of the case. Therefore, *Smith v. Murray*, *supra*, would provide no "guidance" to the district court in addressing the *Gardner* claim and the circuit court erred in remanding for such purpose.

(ii)

Finally, notwithstanding the repeated opportunities presented to the Respondent to litigate the presentence report and all of the circumstances surrounding it, Respondent simply did not pursue the *Gardner* claim in federal court until the untimely amendment to the first application was filed. The law and the facts were available to raise such a claim, at the time of the first federal application, but the claim was simply omitted. Equitable principles do not operate under these circumstances to warrant a review of this claim under the "ends of justice."

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court reverse those portions of the Eleventh Circuit's *en banc* decision which declined to find an abuse of the writ as to any of the issues raised by Respondent in his second application for federal habeas corpus relief. Petitioner further prays that those portions of the Eleventh Circuit's *en banc* opinion which remand this matter to the district court for further consideration be reversed, Petitioner further requests that the Eleventh Circuit be directed to conclude that Respondent's second application in its entirety constitutes an abuse of the writ and that this Court order that any existing stay of execution be lifted with respect to Respondent's case.

Respectfully submitted,

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